

AMENDED IN SENATE MAY 20, 2004

SENATE BILL

No. 1782

Introduced by Senator Aanestad

February 20, 2004

An act to add Section 11152.5 to the Health and Safety Code, and to add Section 1538.1 to the Penal Code, relating to medical crime.

LEGISLATIVE COUNSEL'S DIGEST

SB 1782, as amended, Aanestad. Medical crimes: investigation and prosecution.

Existing law provides that a search warrant for property can issue only upon probable cause, supported by affidavit, particularly describing the property, thing, or things and the place to be searched, and requires the application for a warrant to specify, when applicable, that the place to be searched is in the possession or under the control of a physician. Existing law provides special procedures to protect the privacy of patient information and other privileged materials in the context of a search of a physician's records, when the physician is not reasonably suspected of involvement in criminal activity relating to those records.

This bill would make findings and declarations, and state the intent of the Legislature regarding its provisions. The bill would ~~not~~ *require* *before* the filing of charges against a physician in connection with a physician's prescription of medication to patients ~~unless that~~ the prosecutor first ~~obtains~~ *obtain* declarations under penalty of perjury of at least 2 qualified medical experts, as specified, that *consider whether* the physician did not exercise good faith medical judgment, did not meet the applicable standard of care, and demonstrated malice or demonstrated recklessness that requires the physician be deemed to

have known the consequences of his or her actions. This bill would also, in the context of a criminal investigation of a physician, require that patient records taken pursuant to a warrant be copied by the officer seizing the records, would require those copies be provided by the officer to the physician or the physician's designee within 5 days, would require the officer by affidavit to indicate this has been done to the magistrate, and would provide for the magistrate to get copies to the physician or the physician's designee if the officer did not.

By authorizing declarations by medical experts under penalty of perjury, expanding the scope of that felony offense, and by requiring certain acts and affidavits by officers who seek warrants and prosecutors who pursue the prosecution of physicians in connection with prescriptions, this bill would impose a state-mandated local program.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement, including the creation of a State Mandates Claims Fund to pay the costs of mandates that do not exceed \$1,000,000 statewide and other procedures for claims whose statewide costs exceed \$1,000,000.

This bill would provide that with regard to certain mandates no reimbursement is required by this act for a specified reason.

With regard to any other mandates, this bill would provide that, if the Commission on State Mandates determines that the bill contains costs so mandated by the state, reimbursement for those costs shall be made pursuant to the statutory provisions noted above.

Vote: majority. Appropriation: no. Fiscal committee: yes. State-mandated local program: yes.

The people of the State of California do enact as follows:

1 SECTION 1. (a) The Legislature finds and declares that, for
2 the past 20 years, medical journals have reported that when
3 physicians fail to manage their patients' pain appropriately it is
4 partially out of fear of criminal prosecution. It is the intent of the
5 Legislature to alleviate this fear by providing for proper review of
6 cases involving the prescription of pain medication before
7 criminal charges are filed.



(b) It is the intent of the Legislature to encourage physicians to provide adequate pain management to patients in California consistent with Section 2241.5 of the Business and Professions Code, the Intractable Pain Treatment Act.

(c) It is the intent of the Legislature that, where patient records are seized in connection with criminal investigations, physicians should not be prematurely disabled from practicing medicine by not having access to their patient treatment records during those investigations. It is the further intent of the Legislature that, where medical records have been seized in a criminal investigation or prosecution, patients should have access to their medical records through their physicians to continue treatment.

SEC. 2. Section 11152.5 is added to the Health and Safety Code, to read:

11152.5. (a) ~~No~~ *Before* criminal charges ~~shall be~~ *are* filed in connection with a physician's prescription of medication to a patient ~~unless~~, the charging person or entity ~~first obtains~~ *must first obtain* declarations under penalty of perjury of at least two qualified medical experts licensed by and in good standing with the Medical Board of California and with substantial current experience in the same specialty and practice setting as the prospective defendant. These declarations ~~must state~~ *consider* all of the following:

(1) ~~The~~ *Whether the* physician did not exercise good faith medical judgment.

(2) ~~The~~ *Whether the* physician did not meet the applicable standard of care.

(3) ~~The~~ *Whether the* physician demonstrated malice or demonstrated recklessness that requires the physician be deemed to have known the consequences of his or her actions.

(b) Where the prospective defendant characterizes the treatment that gives rise to charges as pain management, at least one of the qualified medical experts identified in subdivision (a) must be board certified in pain medicine by a specialty board recognized by the American Board of Medical Specialties or the Medical Board of California.

SEC. 3. Section 1538.1 is added to the Penal Code, to read:

1538.1. (a) Notwithstanding any other provision of law, all documents that are records of the identity, diagnosis, prognosis, or treatment of any patient that are taken by an officer pursuant to a

1 warrant from a physician who is suspected of engaging or having
2 engaged in criminal activity related to the documents must be
3 copied by the officer, and the copies must be received within five
4 days of the seizure by the physician or, if the physician is in
5 custody, by the physician's designee.

6 (b) If records taken under a warrant are required to be copied
7 pursuant to this section, the officer shall so indicate at the time of
8 the return of the warrant, and shall deliver to the magistrate an
9 affidavit no later than five days from the execution of the warrant
10 to the following effect: "~~I, R.S.~~ _____, the officer by whom this
11 warrant was executed, do swear that true and clear copies of all
12 records of the identity, diagnosis, prognosis, or treatment of any
13 patient that were taken under this warrant were delivered within
14 five days of seizure to the physician who was subject of the search
15 warrant or to that physician's designee, if the physician is in
16 custody."

17 (c) If no statement is received indicating that copies of these
18 records have been provided to the physician or the physician's
19 designee within the time provided, the magistrate shall order that
20 copies be delivered to the magistrate within three days, and the
21 magistrate shall deliver the copies to the physician or the
22 physician's designee within two days following their receipt by the
23 magistrate.

24 SEC. 4. No reimbursement is required by this act pursuant to
25 Section 6 of Article XIII B of the California Constitution for
26 certain costs that may be incurred by a local agency or school
27 district because in that regard this act creates a new crime or
28 infraction, eliminates a crime or infraction, or changes the penalty
29 for a crime or infraction, within the meaning of Section 17556 of
30 the Government Code, or changes the definition of a crime within
31 the meaning of Section 6 of Article XIII B of the California
32 Constitution.

33 However, notwithstanding Section 17610 of the Government
34 Code, if the Commission on State Mandates determines that this
35 act contains other costs mandated by the state, reimbursement to
36 local agencies and school districts for those costs shall be made
37 pursuant to Part 7 (commencing with Section 17500) of Division
38 4 of Title 2 of the Government Code. If the statewide cost of the
39 claim for reimbursement does not exceed one million dollars

1 (\$1,000,000), reimbursement shall be made from the State
2 Mandates Claims Fund.

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